TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 492

WALTER W. FLORA, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1957
CERTIORARI GRANTED NOVEMBER 25, 1957

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 27, 1958

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

WALTER W. FLORA, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

No. 3916, Civil

COMPLAINT—Filed August 3, 1956

Plaintiff brings this action against the United States of America for recovery of an overpayment of internal revenue taxes pursuant to the provisions of 28 USC sec. 1346(a)(1), the amount claimed is less than $10,000, and alleges:

1. Plaintiff is a citizen of the United States.

2. The nature of plaintiff's claim is for the recovery of $5,058.54, the principal amount of income taxes illegally and erroneously assessed and collected from plaintiff for the calendar year 1950, together with interest thereon.

3. Plaintiff at all times herein pertinent was and is a member of the partnership doing business under the firm name and style of Flora Engineering Company; that during the year 1948, plaintiff personally became a member of the Chicago Board of Trade and the New Orleans Exchange and as a member of such organizations was entitled to go and did go upon the floors thereof and engage in a great many commodity transactions in his behalf and in behalf of said partnership; that during the year 1950, the said partnership actively engaged in the business of buying and selling commodities and comcodity (sic) futures, which commodities and commodity futures so purchased by the [fol. 3] partnership were property held by it for sale to customers in the ordinary course of trade or business; that during the year 1950, the said partnership sustained

a net loss in the amount of $85,216.10 in the purchase and sale of such commodities and commodity futures, one-half of which loss was chargeable to and sustained by plaintiff.

2. (sic). That said partnership regularly filed its income tax information return, Form 1065, for the year 1950, in which said return the partnership claim said loss of $85,216.10 as ordinary business loss; that each of the two partners thereafter claimed one-half of said loss, in the amount of $42,608.05, as ordinary business loss upon his or her individual report of income; that on or about the 10th day of March, 1952, the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge, disallowed said loss as an ordinary deduction from business income and levied deficiency assessment against each of the partners, including plaintiff, in the amount of $27,251.13; that subsequently and prior to June 8, 1953, plaintiff paid upon said deficiency assessment the total sum of $5,058.54, in payments as follows: March 11, 1953, the sum of $2,178.92; May 20, 1953, the sum of $2,879.62; that on or about said June 8, 1953, plaintiff regularly filed his claim for refund in said amount, setting forth in said claim his reasons for requesting such refund, a full, true and correct copy of which claim is hereto attached as Exhibit "A" and by this reference incorporated herein as a part of this Complaint; that subsequently and in connection with the submission of an offer in compromise by plaintiff to the Bureau of Internal Revenue, plaintiff filed a withdrawal of said claim; that subsequently and on or about March 5, 1955, plaintiff withdrew his said offer in compromise and renewed his claim for refund, which renewal was effected by the filing of a new claim for refund in words and figures identical with those set forth in Exhibit "A" above referred to an (sic) incorporated herein; that said claim for refund as so renewed has been rejected by direction of the Commissioner on or about the 13th day of July, 1955.

3. (sic) That by reason of the premises, there has been illegally and unlawfully collected from the plaintiff the sum of $5,058.54, which sum, with interest as allowed by law, plaintiff is entitled to recover in this suit.

[fol. 4] Wherefore, plaintiff prays judgment against the defendant in the amount of $5,058.54, together with interest at the rate of 6% per annum upon the amount of $2,178.92 from and after March 11, 1953, and upon the amount of $2,879.62 from and after May 20, 1953.

A. G. McClintock, Attorney for Plaintiff.

Exhibit A to Complaint

U. S. Treasury Department—Internal Revenue Service

Form 843 CLAIM

Rev. Jan. 1955 To Be Filed With The District Director Where Assessment was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

___ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

___ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

___ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: Walter W. Flora.

Number and street: 4101 East 17th Avenue.

City, town, postal zone, State: Denver 3, Colorado.

1. District in which return (if any) was filed: Cheyenne, Wyoming.

2. Name and address shown on return, if different from above

3. Period—If for tax reported on annual basis, prepare separate form for each taxable year: From Jan. 1, 1950. To Dec. 31, 1950.

[fol. 5] 4. Kind of tax: Income tax.

5. Amount of assessment: $27,251.13.
Dates of Payment: 3-11-53, $2,178.92; 5-20-53, $2,879.62.

6. Date stamps were purchased from the Government: ....

7. Amount to be refunded: $5,058.54.

8. Amount to be abated (not applicable to income, estate, or gift taxes): $.....

9. The claimant believes that this claim should be allowed for the following reasons: Reasons are set forth on Schedule 1, attached hereto and made a part hereof by reference.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated June 8, 1953

Walter W. Flora

[fol. 7] IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed October 3, 1955

The defendant by its attorney, John F. Raper, Jr., United States Attorney for the District of Wyoming, answers the plaintiff's complaint as follows:

First Defense.

For a first defense the defendant alleges that:

I. Plaintiff's complaint fails to state a claim within the jurisdiction of this Court and fails to state a claim upon which relief may be granted for the reason that the complaint shows on its face that plaintiff has not paid all of the individual federal income taxes assessed against him for the calendar year 1950, part of which plaintiff seeks to recover in this action.

II. Plaintiff's complaint states and admits in the fourth numbered paragraph thereof, numbered paragraph 2, that the Commissioner of Internal Revenue levied a deficiency assessment against the plaintiff in the amount of $27,251.13; and that plaintiff has paid only the total sum of $5,058.54 upon said deficiency assessment.

III. On March 27, 1953, the Commissioner of Internal Revenue made a deficiency assessment against plaintiff for individual income taxes and interest thereon according to law for the calendar year 1950 in the amount of $27,251.13 taxes and $1,657.47 interest, making a total deficiency assessment of $28,908.60.

IV. Plaintiff has paid only the total amount of $5,058.54 on the aforesaid deficiency assessment, leaving an outstanding balance now due and owing to the United States of America of $23,850.06, plus interest thereon according to law.

* * * * * * *

[fol. 10] Wherefore, the United States of America prays that the plaintiff take nothing by this action and the defendant have a money judgment against the plaintiff, Walter W. Flora, in the amount of the outstanding unpaid balance of the plaintiff's individual income tax liability for the year 1950 as set out above, plus the penalty of $45.00, together with interest thereon according to law and for such other and further relief as to the court may appear just and proper in the premises.

John F. Raper, Jr., United States Attorney, District of Wyoming. By: William G. Walton, Assistant U. S. Attorney, District of Wyoming.

* * * * * * *

[fol. 11] IN THE UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS SET FORTH IN DEFENDANT'S ANSWER—February 27, 1956

The matter of the First Defense, pleaded in the Answer filed by the defendant herein, being in effect a motion to

dismiss for failure to state a claim within the jurisdiction of this court and failure to state a claim upon which relief may be granted, having heretofore come on for hearing by the Court, and having been argued by counsel for the parties hereto and by the Court taken under advisement, and the Court being now fully advised in the premises:

It Is Ordered by the Court that the said motion respecting defendant's First Defense, or motion to dismiss, be and the same is hereby overruled.

Dated February 27, 1956.

Ewing T. Kerr, Judge.

February 27, 1956.

[fol. 12] In the United States District Court

Judge's Memorandum—Decided July 24, 1956

Kerr, Judge.

The primary question here is whether losses sustained by taxpayer in 1950, resulting from trading in commodities and commodity futures, were capital losses within the meaning of the term defined by Section 117(a)(1) of the Internal Revenue Code of 1939.

The taxpayer by this action seeks to recover payments made by him upon his 1950 income tax which he claims to have been illegally assessed.

Flora, the taxpayer, is a partner in the Flora Engineering Company. In its partnership return of income for 1950 it claimed as ordinary loss the amount of $85,216.10 growing out of transactions in commodities and commodity futures during that year. The loss so claimed was disallowed by the Bureau, thereby resulting in an additional income to taxpayer in the amount of $42,608.05. On March 27, 1953, a deficiency assessment was made against the taxpayer in the amount of $27,251.13. Taxpayer paid the sum of $5,958.54 on said deficiency assessment and this action has for its purpose the recovery of said sum so paid.

The government filed a motion to dismiss this action and as a basis therefor alleged that this Court was without

jurisdiction to hear and determine the matter as the complaint showed conclusively on its face that the taxpayer has not paid the full amount of the tax deficiency assessed against him.

Historically, it has been the established policy of our tax system for the taxpayer to pay first and litigate afterwards. This is the method of corrective justice consistently followed by the lower courts since the decision of Cheatham v. United States, 92 U.S. 85. Recently, however, in the case of Bushmiaer v. United States, 230 F.2d 146 (8 Cir.), page 149, the Court held: "There is no provision in the revenue act specifically requiring the taxpayer to pay the full amount of the additional assessment unless that may be inferred from the provision requiring the taxpayer as a condition precedent to his right to maintain a civil action in the District Court to file a claim for refund." The court in reversing the (sic)

[fol. 13] The decision of the trial court allowed suit to be maintained where the taxpayer paid the sum of $5,000.00 on an assessment of $137,987.28.

The Bushmiaer case is in direct conflict with Suhr vs. United States, 18 F.2d 81 (3 Cir.), where the court stated at page 83:

> "None of the various tax acts provide for recourse to the courts by a taxpayer until he has failed to get relief from the proper administrative body or has paid all the taxes assessed against him. The payment of a part does not confer jurisdiction upon the courts. Blair v. U. S. ex rel. Birkenstock, supra."

It is important to note that in the Cheatham case the court said at page 88:

> "So also, in the internal-revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, on *paying the tax* the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.

"It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues."

And again at page 89:

* * * "It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable." * * * "He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can pay the amount claimed, and commence his suit at any time within that period."

It will be noted that the Court refers to paying "the tax" as a prerequisite to suit for recovery. It contemplates a payment of the entire tax assessed and not a token payment [fol. 14] for the purpose of obtaining a judicial determination of the unpaid balance prior to the payment of the same.

This principle has been consistently approved by the Supreme Court in the following cases: Savings Institution v. Blair, 116 U.S. 200; Dodge v. Osborn, 240 U.S. 118; Graham v. Dupont, 262 U.S. 234; Phillips v. Commissioner, 283 U.S. 589; United States v. Jefferson Electric Company, 291 U.S. 386; Dobson v. Commissioner, 320 U.S. 489.

In 1924 Congress recognized the hardships imposed on taxpayers in being required to pay the tax assessed as a condition precedent to bringing a suit for recovery of the same and established the Board of Tax Appeals (now the United States Tax Court). The Board of Tax Appeals was set up as a place where the validity of an income tax assessment could be litigated prior to the payment of the deficiency assessment. It is important to quote the precise language of the House Committee on Ways and Means when it created the Board of Tax Appeals:

"[H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8 (1939-1 Cum. Bull. (Part 2) 241, 246-247)]:

"The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may

appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he cannot, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous, and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment."

[fol. 15] I have carefully considered the decisions respecting the rights of the taxpayer and it is my reasoned judgment that since the complaint shows on its face that the plaintiff has not paid the entire tax assessment he should not maintain the instant suit. However, since the Third and Eighth Circuits are in conflict on the subject and this Circuit has not had occasion to pass on the matter, I deem it advisable to pass upon the merits of the case as the record consists only of a stipulation of facts and a few pages of testimony.

* * * * * * * * *

Filed July 24, 1956.

[fol. 18] In the United States District Court

Findings of Fact and Conclusions of Law—Filed August 21, 1956

The above-entitled action came regularly before the Court for trial without a jury on the 10th day of May, 1956,

plaintiff appearing by his attorney, A. G. McClintock, and [Fol. 19] and (sic) defendant appearing by its attorneys, John F. Raper, Jr., United States Attorney for the District of Wyoming and Thomas H. Foye, Attorney, Tax Division, Department of Justice, and the Court, having heard and considered the stipulation of facts and the evidence produced by and on behalf of the plaintiff and the defendant and the briefs and arguments of counsel, and being fully advised on the premises, does hereby make and enter its findings of fact and conclusions of law.

Findings of Fact.

1. Walter W. Flora, the plaintiff here, is a partner in the Flora Engineering Company.

2. The Flora Engineering Company is a family partnership and was formed to engage in the business of engineering and farming, although during 1950, no farming activities were carried on by it.

3. During 1950, the plaintiff, in his individual capacity and not as a member of the firm Flora Engineering Company, became a member of the Chicago Board of Trade and the New Orleans Exchange, and as such member was authorized to go upon the floor of those exchanges and personally buy and sell commodities or commodity futures.

4. During 1950, the plaintiff traded on these exchanges for his own account or for the account of the partnership. At no time did he trade for the account of anyone else.

5. During 1950, the plaintiff spent 60% to 70% of his time trading on the floors of these exchanges. In 1950, the total volume of trading carried on by him in commodity futures was $16,940,000 while the total volume of trading carried on by him in actual commodities in that year was $322,000. He carried out 397 transactions during 1950.

6. The Flora Engineering Company maintained an office in Denver, Colorado, in its name and from that office, the plaintiff contacted people by telephone in an attempt to sell actual commodities to them. In some cases, people contacted him at his office, in an attempt to buy actual commodities.

7. The plaintiff did not maintain a board in the office [fol. 20] referred to in paragraph 6 for quoting prices of commodities or commodity futures. He did not advertise through any of the normal advertising media nor did he employ any salesmen or customers' men.

8. All of the plaintiff's transactions during 1950 in both commodities and commodity futures were entered into by the plaintiff in the expectation of making a profit only as a speculator. He did not expect a middleman's profit from any of his transactions in commodities or commodity futures. In fact, the plaintiff did not receive any compensation for services performed by him as a middleman but derived his profits or suffered his losses due to his transactions in the market as a speculator.

9. During 1950, neither the plaintiff nor the Flora Engineering Company were engaged in farming, manufacturing, or any other activity which would require the use of either the actual commodities or the commodity futures traded in by the plaintiff.

10. During 1950, the plaintiff sustained losses in the amount of $85,216.10 growing out of transactions in commodities and commodity futures during that year.

11. In its partnership return of income for the year 1950, Flora Engineering Company claimed as an ordinary loss this amount of $85,216.10. The Internal Revenue Service disallowed this as an ordinary loss, which disallowance resulted in an addition to the income of the plaintiff in the amount of $42,608.05. Accordingly, a deficiency was assessed against the plaintiff for unpaid income taxes in the amount of $27,251.13, plus interest of $1,657.47 making a total deficiency assessment of $28,908.60. An additional penalty of $45.00 plus interest thereon according to law was assessed against the plaintiff in June 1955.

12. The plaintiff has paid a total of $5,058.54 on these assessments. This sum was paid as follows: $3,178.92 on March 11, 1953 and $2,879.62 on June 21, 1953. The balance of these assessments has not been paid.

13. Subsequent to making these payments the plaintiff filed a claim for refund thereof. This claim was filed on the

[fol. 21] theory that losses sustained by the plaintiff during the year in question were ordinary losses and should have been deductible as such. The claim was disallowed on behalf of the Commissioner of Internal Revenue by registered notice of disallowance dated July 13, 1955. The claim was disallowed because of a determination by the Commissioner of Internal Revenue that the losses sustained during the year in question were capital losses.

Conclusions of Law.

1. The plaintiff's principal activity during the year 1950 was trading in commodity futures. His trading in actual commodities was a natural incident of future trading. For that reason, losses sustained in both types of activity shall receive the same tax treatment.

2. The losses sustained by the plaintiff in trading in the commodities and commodity futures during 1950 were capital losses within the meaning of the term as defined by Section 117(a)(1) of the Internal Revenue Code of 1939.

3. Judgment will be entered against the plaintiff and in favor of the defendant on its counterclaim.

To which and all of which findings of fact and conclusions of law the plaintiff at the time excepted and exception allowed.

Dated this 21 day of August, 1956.

Ewing T. Kerr, United States District Judge.

Approved as to form: A. G. McClintock, Attorney for Plaintiff; John E. Raper, Jr., United States Attorney.

In the United States District Court

Judgment—August 21, 1956

The above-entitled action came regularly before the Court for trial without a jury on the 10th day of May, 1956, [fol. 22] plaintiff appearing by his attorney, A. G. McClintock, and defendant appearing by its attorneys, John F.

Raper, Jr., United States Attorney for the District of Wyoming and Thomas H. Foye, Attorney, Tax Division, Department of Justice, and the Court, having considered the stipulation of facts and having heard and considered the evidence produced by and on behalf of the plaintiff and the defendant and having considered the briefs and arguments of counsel, and having heretofore made and entered its findings of fact and conclusions of law and the Court otherwise being fully advised:

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that plaintiff take nothing by this action and that defendant have judgment against the plaintiff for the amount of $23,895.06 plus interest thereon as allowed by law from the dates of the assessments, with costs herein to be paid by the plaintiff.

To all of which plaintiff at the time excepted and exception allowed.

Dated this 21st day of August, 1956.

Ewing T. Kerr, United States District Judge.

Approved as to form: A. G. McClintock, Attorney for Plaintiff; John F. Raper, Jr., United States Attorney.

Filed August 21, 1956.

In the United States District Court

Notice of Appeal—Filed September 20, 1956

Notice Is Hereby Given That Walter W. Flora, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered herein on August 21, 1956, ordering and adjudging that plaintiff take nothing by his action and that defendant have judgment against the plaintiff for the amount of $23,895.06, plus interest as allowed by law.

A. G. McClintock, Attorney for Plaintiff.

[fol. 23] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ARGUMENT AND SUBMISSION—May 13, 1957

First Day, May Term, Monday, May 13th, 1957.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard and was argued by counsel, A. G. McClintock, Esquire, appearing for appellant, John N. Stull, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

[fol. 24] IN UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5502—May Term, 1957

WALTER W. FLORA, Appellant;

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Wyoming.

OPINION—July 1, 1957

A. G. McClintock for Appellant.

John N. Stull (Charles K. Rice, Assistant Attorney General, A. F. Prescott and David O. Walter, Attorneys, Department of Justice, and John F. Raper, Jr., United States Attorney, were with him on the brief) for Appellee.

Before Phillips, Pickett and Lewis, Circuit Judges.

Lewis, Circuit Judge.

[fol. 25] By complaint filed in the United States District Court for the District of Wyoming, plaintiff Flora[1] sought

[1] Hereinafter called the taxpayer.

recovery of the sum of $5,058.54 paid to the government in partial satisfaction of a deficiency personal income tax assessment for the year 1950 in the amount of $27,251.13. Taxpayer alleged the deficiency to be erroneously assessed and the payment to be illegally collected because of a determination by the Commissioner of Internal Revenue that certain losses occurring to the taxpayer during the tax period and reported by him as ordinary losses were properly capital losses within the meaning of that term as defined by sec. 117(a)(1) of the Internal Revenue Code of 1939.

Jurisdiction is alleged to exist under the provisions of 28 U.S.C.A. 1346.[2] Responding to the complaint, the government alleged that the action could not be maintained in [fol. 26] the District Court because the entire amount of the assessment had not been paid and, without waiving this special defense, counterclaimed for the unpaid balance. The District Court denied the special defense[3] but entered judgment upon the merits for the government on its counterclaim.

We are of the opinion that determination of a single question is dispositive of the case: Can a taxpayer maintain a personal income tax refund suit in the District Court without first paying the entire amount of the tax assessed for the period in question?

Beginning with the comments of Mr. Justice Miller in Cheatham v. United States, 92 U.S. 85, 23 L. Ed. 561, and

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[2] Section 1346 provides, in part:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of (1) (As amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws * * *."

[3] 142 F. Supp. 602. The trial judge, although indicating he thought the defense meritorious, deemed it better practice to reserve the question for this court in view of what he considered a conflict between the circuits. See Suhr v. U. S. (3 Cir.) 18 F.2d 81; Bushmiaer v. U. S. (8 Cir.) 230 F.2d 146.

continuing through many decisions,[4] the Supreme Court has consistently indicated that full payment of a tax deficiency [fol. 27] is a prerequisite to a judicial claim for refund. And such has been the established policy of our tax system.[5]

In 1924, Congress, recognizing both the desirability of maintaining a minimum of judicial interference with the collection of taxes and the concomitant hardship imposed on taxpayers by an inflexible "pay first, litigate later" rule, established the Board of Tax Appeals (now the United States Tax Court) as a place where the validity of a tax assessment could be initially questioned. In creating the Board of Tax Appeals the House Committee on Ways and Means stated:

> "(H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7-8 (1939) 1 Cum. Bull. (Part 2) 241, 246-247):
>
> "The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, *after payment of his tax*, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he [fol. 28] cannot, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income

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[4] King Co. Savings Institution v. Blair, 116 U.S. 200, 6 S.Ct. 353, 29 L.Ed. 657; Dodge v. Osborn, 240 U.S. 118, 36 S.Ct. 275, 60 L.Ed. 557; Graham v. Dupont, 262 U.S. 234, 43 S.Ct. 567, 67 L.Ed. 965; Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289; United States v. Jefferson Electric Co., 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859; Dobson v. Commissioner, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248.

[5] For a discussion of the historical development of this policy see the opinion of Woodrough, Circuit Judge, dissenting in Bushmiaer v. United States, supra.

> received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy and often causes great financial hardship and sacrifice. The results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." (Emphasis supplied.)

Since the establishment of the tax court the distinctive purpose of its creation has been judicially recognized and its intended powers guarded. In Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721, 49 S. Ct. 499, 73 L. Ed. 918, the Supreme Court stated:

> [fol. 29] "The Board of Tax Appeals, established by Sec. 900 of the Revenue Act of 1924, Tit. IX, c. 234, 43 Stat. 253, 336, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of tax after its payment."

And in Dobson v. Commissioner, (sic) supra, the court stated:

> "Congress has invested the tax court with primary authority for redetermining deficiencies, which constitutes the greater part of the tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in [fol. 30] the tax court and not in the regular courts."

In view of such consistent statements of the Supreme Court and the actual wording of sec. 7422 of the Internal Revenue Code of 1954[a] we are not impressed with the argument that the instant suit is but a claim for refund for an amount of tax actually paid and does not include a review of the total assessment or the remaining deficiency not paid. Such approach is unrealistic and serves only to conveniently defeat the established purpose and function of the tax court.

Taxpayer's complaint wherein it affirmatively appeared that only a partial payment upon a deficiency assessment had been made failed to state a claim. The government, apparently content with the deficiency assessment, does not contend that its judgment upon counterclaim should be sustained independently.

[fol. 31] The cause is Remanded to the District Court with directions to vacate the judgment of the government upon its counterclaim and to dismiss the action without prejudice.

[fol. 32] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JUDGMENT—July 1, 1957

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that this cause be and the same is hereby re-

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[a] "Civil Actions for Refund.

"(a) No Suit Prior to Filing Claim for Refund.

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, * * *."

manded to the said district court with directions to vacate the judgment of the government upon its counterclaim and to dismiss the action without prejudice.

[fol. 33] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 34] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—November 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
SEP 23 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 492

WALTER W. FLORA, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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the issue and take an appeal in accordance with general legal principles, that construction certainly should be favored over one that will result in a considerable limitation on the taxpayer's remedies. Mr. Justice Holmes, in *United States v. Emery Bird, Thayer Realty Company*, 237 U. S. 28, rejected an argument concerning jurisdiction resting upon the "inadmissible premise that the general act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye." This Court, in *United States v. Shaw*, 309 U. S. 495, 501 has said:

> "As representative governments attempt to ameliorate inequalities, as necessities will permit, prerogatives of the government yield to the needs of the citizen. . . . When authority is given, it is liberally construed."

Unless, therefore, there are considerations of the greatest weight dictating such adverse construction, the construction given the statute by this Court should be liberal. Practical considerations and taxing policy were advanced to the court in the case of *Hanchett v. Shaughnessy*, (D. C., N.D.N.Y.), 126 F. Supp. 770, as the basis for denying jurisdiction in an essentially similar situation. Reference was made to section 3772 of Title 26 of the Code, (now section 7422 of the Internal Revenue Code, quoted above and in the opinion of the court below) and it was contended that that statute required payment of the full amount of tax before the action could be brought. The court held that the conditions were concerned with the filing of the claim rather than the payment of the tax, upon which the right to maintain the action depends.

> "The section by its language contemplates an action to recover . . . any sum alleged to have been ex-